(24)

Nos. 94-1893 94-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, *et al.*
and
THE NATIONAL CABLE TELEVISION ASSN., INC.

Petitioners,

v.

BELL ATLANTIC CORPORATION, *et al.*

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

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May 30, 1995

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RULE 29.1 STATEMENT

Respondent Bell Atlantic Corporation is a publicly held corporation in the business of providing telecommunications services and products to the general public. Respondent Bell Atlantic Video Services Company and the Bell Atlantic telephone company respondents are wholly owned subsidiaries of Bell Atlantic Corporation. The following subsidiaries of Bell Atlantic Corporation have securities in the hands of the public:

Bell Atlantic — Delaware, Inc.
Bell Atlantic — District of Columbia, Inc.
Bell Atlantic — Maryland, Inc.
Bell Atlantic — New Jersey, Inc.
Bell Atlantic — Pennsylvania, Inc.
Bell Atlantic — Virginia, Inc.
Bell Atlantic — West Virginia, Inc.
Bell Atlantic Systems Leasing International, Inc.
Bell Atlantic Tricon Leasing Corp.
Bell Atlantic Financial Services, Inc.
Bell Atlantic Mobile Systems, Inc.
Bell Atlantic Network Funding Corp.
Bell Atlantic Capital Funding Corp.

In addition, Bell Atlantic owns approximately 25% of Telecom Corporation of New Zealand Ltd. and approximately 23% of Grupo Iusacell, S.A. de C.V., whose stock is publicly traded in the United States.

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RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

This Court should grant the petitions for certiorari to consider whether 47 U.S.C. § 533(b), which bars local telephone companies from providing video programming directly to subscribers in their telephone service areas, violates the First Amendment. Even though every one of the 16 federal judges who has considered the question has concluded that § 533(b) is unconstitutional, this Court's review is needed, as a practical matter, to provide guidance to the Nation's telecommunications industry.

In the coming years, telephone companies will be in a position to invest billions of dollars in network modernization to build the "Information Superhighway." The Government's policymaking agencies have themselves recognized, however, that telephone companies cannot be expected to make these massive investments with no guarantee that the companies will be able to provide the video speech necessary to ensure that the networks are adequately utilized and economically viable.

Lower court decisions cannot provide the degree of assurance needed to permit telephone companies to make the full scope of the planned investment. There is a compelling public need for an authoritative adjudication by this Court that telephone companies have a First Amendment right to provide video speech to their customers and that § 533(b) is an unconstitutional abridgment of that right.

Both petitioners suggest that this Court vacate the judgment below and remand the case for further consideration, citing the recent administrative action by the Federal Communications Commission (FCC) in its *Third Report and Order*, FCC 95-203 (May 16, 1995), reprinted in Govt. Supp.

Br. App. 1a-21a.[1] That action constitutes a virtual confession of error by the FCC that § 533(b) no longer serves any legitimate governmental interest and that "routinely" *waiving*, rather than *enforcing*, the provision would "promote competition." Supp. Br. App. 10a, 19a. The Commission makes this unusual retreat in the hope of persuading this Court to vacate the Court of Appeals' decision without reviewing this case on the merits.

To our knowledge, however, this Court has *never* vacated the judgment of a Court of Appeals holding a statute unconstitutional merely because an administrative agency, as a party to the case, has subsequently offered a supposed "saving construction" of the statute. There is no reason to depart from this settled practice here. The *Third Report and Order* is nothing more than a statement of the FCC's unilateral intent, subject to change at any time in the Commission's discretion, to permit telephone companies to provide video programming under certain circumstances and pursuant to unspecified "terms and conditions" still to be devised by the Commission. Supp. Br. App. 6a n.11, 13a-14a. This supposed "saving construction," based on the "good-cause waiver" provision of § 533(b)(4), has *already* been considered by the Court of Appeals. In requesting a remand, petitioners in effect seek a *second* opportunity at rehearing to raise the same arguments again.

Moreover, petitioners' "saving construction" is not a serious one. It contradicts the sole authoritative judicial interpretation of § 533(b)(4). Indeed, the FCC itself, with the strong support of the NCTA, has previously *rejected* the

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[1] References to the *Third Report and Order* are styled "Supp. Br. App.___a." References to the decisions of the District Court and Court of Appeals, as reprinted in the Appendix to the Government's Petition for Certiorari, are styled as "Pet. App. ___a." References to the Joint Appendix in the Court of Appeals are styled "JA ___."

construction it now proffers before this Court, with no explanation for the sudden shift in the Commission's long-standing view. Furthermore, far from "saving" the statute, the construction would *exacerbate* the constitutional defect in § 533(b), by giving the Commission standardless licensing power over telephone company speech, with no statutory limits on the FCC's discretion.

Accordingly, there is no merit to petitioners' suggestion that this Court vacate the judgment below and remand for further consideration. Such action is not necessary to give the Commission an opportunity to develop its supposedly "more speech-friendly plan" to regulate telephone company provision of video programming. Supp. Br. App. 3a-4a (internal quotation omitted). Nothing about the Court of Appeals' judgment, if left intact, would prevent the FCC from adopting reasonable rules — otherwise in compliance with the Constitution — to address directly whatever competitive risks might arise from telephone company speech. Indeed, the District Court and Court of Appeals urged the Commission to pursue that very course, in holding that § 533(b) is not narrowly tailored to the Government's asserted interests. Pet. App. 47a-48a, 99a, 104a-107a.

Petitioners' objective seems to be to avoid this Court's plenary review of this case on the merits. But that objective can be achieved simply through a denial of certiorari. However, given the importance of the issues presented, and the public interest in a prompt and authoritative resolution of them, the petitions for certiorari should be granted and the case set for plenary briefing and argument. At that stage, petitioners' arguments about the implications of the *Third Report and Order* can be considered in due course on the merits.

I. SECTION 533(b) VIOLATES THE FIRST AMENDMENT

As the Court of Appeals recognized, "[t]he First Amendment problem with § 533(b) is that the provision does not allow the telephone companies to engage in protected speech, that is, the provision, with editorial control, of cable television services." Pet. App. 15a n.10.

1. Every federal judge who has considered the question has concluded, without exception, that § 533(b) violates the First Amendment under the test for incidental restrictions on speech set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968).[2] Every federal agency with responsibility for

[2] In addition to the decisions below, see *U S WEST, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash.), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *petition for rehearing pending; Pacific Telesis Group v. United States*, 48 F.3d 1106 (9th Cir. 1994), *petition for rehearing pending*; *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994), *appeal pending*, No. 94-7036 (11th Cir.); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994), *appeal pending*, No. 95-1223 (7th Cir.); *NYNEX Corp. v. United States*, No. 93-323-P-C (D. Me.) (Dec. 8, 1994), *appeal pending*, No. 95-1183 (1st Cir.); *GTE South, Inc. v. United States*, No. 94-1588-A (E.D. Va. Jan. 13, 1995), *appeal pending*; *United States Telephone Ass'n v. United States*, No. 94-1961 (D.D.C. Feb. 14, 1995), *appeal pending*, No. 95-1175 (D.C. Cir.); *Southwestern Bell Corp. v. United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995); *Southern New England Telephone Co. v. United States*, No. 3:94-CV-80 (D. Conn. Apr. 28, 1995); *see also GTE California, Inc. v. FCC*, 39 F.3d 940, 951 (9th Cir. 1994) (Noonan, J., dissenting) (concluding, where majority did not reach merits, that § 533(b) is "counterproductive . . . [and] does not even survive rationality review"); *American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1182 & n.8 (D.C. Cir. 1995) (noting "serious questions as to whether the . . . concerns underlying the FCC's original promulgation of the rule survive in light of industry and technology changes since 1970").

telecommunications policy has recommended that § 533(b) be removed. The Government's policymakers have not only rejected the justifications for § 533(b) that petitioners attempt to impute to Congress (even though Congress never articulated them); the policymakers have unanimously reached the even more damning conclusion that § 533(b) is *counterproductive* and positively *disserves* the Government's objectives of enhancing competition and consumer welfare. No restraint on speech has ever been upheld when every responsible government agency has rejected it and recommended its removal.

2. For example, after compiling a full administrative record over a period of five years, the FCC in 1992 formally recommended that § 533(b) be eliminated.[3] The Commission concluded that removing the ban would "increas[e] competition in the video marketplace, spur[] the investment necessary to deploy an advanced infrastructure, and increas[e] the diversity of services made available to the public."[4] According to the FCC, eliminating § 533(b) "would result in significant price savings for consumers and stimulate provision of a range of new information services," with rates falling about 20 percent and subscribership increasing by 11.2 million households nationwide.[5] Reed E. Hundt, the current Chairman of the FCC, testified that removing § 533(b) would "stimulate new telephone company investment in facilities that are capable of delivering video and advanced telecommunications services," foster "facilities-based

[3] Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rule Making, *Telephone Company-Cable Television Cross-Ownership Rules*, 7 FCC Rcd 5781, 5820 (1992).

[4] Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program 67 (Apr. 28, 1992).

[5] *Id.* at 16.

competition," "expand the electronic marketplace of ideas," and result in "technological and service innovation, lower prices, and responsiveness to consumer tastes."[6] In November 1994, the Commission formally reiterated its recommendation that § 533(b) be eliminated.[7]

The FCC's recent rulemaking, while only a self-imposed promise not to enforce the challenged statute, affirms these conclusions. The Commission expressly disavows any intention, for now at least, to enforce what it calls "the absolute ban" on telephone company video speech "contained in the statute." Supp. Br. App. 4a. According to the FCC, "[t]he relevant circumstances have changed greatly since the Commission adopted its cross-ownership rules in 1970 and Congress 'modeled [§ 533(b)] after the FCC['s] rules' in 1984." *Id.* at 11a (citation omitted). In today's market, "*authorizing* the telephone companies to provide video programming" — rather than banning them from speaking — "will advance the policy underlying the cross-ownership restriction [and] . . . promote competition." *Id.* at 5a (emphasis added).

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[6] Statement of Reed E. Hundt, Chairman, Federal Communications Commission, Before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, U.S. House of Representatives, on H.R. 3636, the "National Communications Competition and Information Infrastructure Act of 1993," and H.R. 3626, the "Antitrust Reform Act of 1993" and the "Communications Reform Act of 1993," Jan. 27, 1994, at 16-17.

[7] *Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 (Nov. 7, 1994), at ¶ 265 (finding that any anticompetitive risk "can and should instead be addressed through our video dialtone framework and other appropriate regulatory safeguards").

Every other expert telecommunications agency has reached the same conclusion.[8]

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[8] The National Telecommunications and Information Administration (NTIA) of the Department of Commerce has determined that removing § 533(b) would "expand competition in the provision of video programming" and that the potential dangers "are either overstated or can be effectively ameliorated by adapting existing regulatory safeguards to suit the video programming marketplace." NTIA, *Telecommunications in the Age of Information* 235 (1991). The NTIA has also concluded that § 533(b) is "inefficient and anticompetitive" and is "retard[ing] investment . . . in broadband public network technology." *Id.* at 242.

Outside the context of this litigation, the Department of Justice has determined that removing § 533(b) "will allow another competitor to enter the video programming market, . . . increase the [telephone companies'] willingness to take the financial risk of developing broadband integrated networks, [and] make them more effective competitors." Reply Comments of the United States Department of Justice before the Federal Communications Commission, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt 87-266 at 44-45 (Mar. 13, 1992). The Department has further concluded that telephone company "provision of video programming will have procompetitive benefits that outweigh any anticompetitive risks involved." *Id.; see also* Statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, U.S. House of Representatives, Concerning the National Communications Competition and Information Infrastructure Act, H.R. 3636, and the Antitrust Reform Act, H.R. 3626, Jan. 27, 1994, at 10 ("The Administration . . . strongly endorses the provisions of H.R. 3636 that would permit existing cable and telephone companies to offer both video and telephonic services in the same geographic areas.").

In January 1994, the Clinton Administration released its "White Paper on Communications Act Reforms," which outlined the Administration's proposal to remove 47 U.S.C. § 533(b) and explained that, "[a]lthough the existing cable-telephone company cross-ownership restriction of the 1984 Cable Act may have been appropriate when enacted, today it is an unnecessary and artificial barrier to competition in the delivery of video programming to American consumers and to investment in advanced local infrastructure." White Paper, p. 6.

3. Under intermediate First Amendment scrutiny, the burden lies on the Government to show that the challenged regulation "is sufficiently tailored to its goal." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995). "That burden is not satisfied by mere speculation and conjecture." *Id.* at 1592 (internal quotation omitted). Indeed, in *Turner Broadcasting Co. v. FCC*, 114 S. Ct. 2445 (1994), a plurality of this Court emphasized that, even when Congress makes "unusually detailed" factual findings that "are recited in the text of the Act itself," *id.* at 2454, 2461, in a First Amendment case a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 2470, 2471; *see also Ibanez v. Florida Department of Business & Professional Regulation*, 114 S. Ct. 2084, 2088-89 (1994); *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993).

Given the unanimous conclusions of the Government's policymakers, it is impossible to sustain § 533(b) under the "narrow tailoring" requirement of *O'Brien* by hypothesizing risks and speculating that a reasonable Congress might have believed that § 533(b) is an appropriate way to address them. A regulation of speech that every relevant government agency has determined to be affirmatively *counterproductive* cannot be narrowly tailored to the Government's asserted interests.

4. Moreover, as the Court of Appeals held, § 533(b) fails *O'Brien* for the separate reason that it "also does not leave . . . telephone companies with ample adequate alternative avenues of communication." Pet. App. 49a-51a.[9]

[9] In a long series of decisions, this Court has "voiced particular concern with laws that foreclose an entire medium of expression" to a targeted group of speakers. *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2045 (1994) (invalidating a municipal ordinance that prohibited homeowners from displaying many kinds of signs on their property); *see also United States v. NTEU*, 115 S. Ct. 1003, 1013 & n.11, 1014 (1995) (striking down federal employee honoraria ban and requiring the Government to shoulder an unusually "heavy" burden of justification because of "[t]he widespread impact" of the law on "an enormous quantity of speech"); *Schneider v. State*, 308 U.S. 147, 164-65 (1939); *Martin v. Struthers*, 319 U.S. 141, 145-49 (1943).

It excludes telephone companies from what is undisputedly "the most important mass medium in America."[10] The alternatives posited by the Government, such as broadcast television stations, direct broadcast satellites, or "wireless cable" systems, deny telephone companies the right to use their property — the existing telephone network — for expressive purposes. Inviting telephone companies to construct a *separate* multibillion-dollar network to carry their speech is not a meaningful alternative. Indeed, it is undisputed in this case that the alternatives supposedly left to telephone companies would exclude 99% of the programming that Bell Atlantic would supply directly to consumers in the absence of § 533(b).[11] This is the "practic[al]" reality with which the First Amendment is concerned. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977).

[10] JA 141 (uncontradicted affidavit of William E. Lee ¶ 2). Millions more people have televisions than subscribe to newspapers. The average television household watches television seven hours per day, whereas the average U.S. resident spends less than half an hour per day reading a newspaper. Stipulated Facts 10-14 [JA 8715]. The Government itself has recognized that the "power to communicate ideas through sound and visual images ... is significantly different from traditional avenues of communication because of the immediacy of the medium." *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (quoting FCC Report and Order), *cert. denied*, 482 U.S. 919 (1987).

[11] Affidavit of Robert Townsend ¶ 8 [JA 216].

5. Finally, § 533(b) is subject to strict scrutiny both as a direct ban on speech as such and as a content-based restriction on speech.

a. The *O'Brien* standard arose in and has been reserved exclusively for regulations having only an "incidental" effect on First Amendment freedoms. *O'Brien*, 391 U.S. at 376, 377. But § 533(b) cannot qualify for the *O'Brien* test because it is a direct ban on speech as such, and on nothing but speech. Section 533(b) bans the very acts of selecting, editing, and arranging video programs, for provision directly to subscribers, that this Court has identified as warranting First Amendment protection in the cable context. *See Turner Broadcasting*, 114 S. Ct. at 2456. This Court has applied strict scrutiny to direct restraints on expression, without inquiring into any respects in which they might have been content-based.[12]

b. In fact, § 533(b) *is* impermissibly content-based, because the prohibited "video programming" is defined as "programming provided by, or generally considered

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[12] In *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), for example, this Court applied "exacting scrutiny" to expenditure limitations that were "direct and substantial restraints on the quantity" of speech itself, *id.* at 39, 44, even though they were "neutral as to the ideas expressed." *Id.* at 39. The limitation was designed not to suppress ideas of any particular sort, but rather to equalize voters' electoral participation by "restricting the voices of people and interest groups who have money to spend." 424 U.S. at 17. Nonetheless, the Court explained that "[w]e cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*" because the "restraints on First Amendment liberty ... are both gross and direct." *Id.* at 15, 16.

And in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), this Court explained that "exacting First Amendment scrutiny" applies to "a direct restriction on the amount of money a charity can spend on fundraising activity" because such a law is "a direct restriction on protected First Amendment activity." *Id.* at 788-89 (internal quotations omitted).

comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19). To take one example, § 533(b) permits telephone companies to provide "educational multimedia presentations" containing "video images,"[13] but not educational programming "comparable" to 1984 television broadcasts such as "Sesame Street." As the District Court observed, "§ 533(b), as written and enacted, requires reference to the content of the relevant message in order to determine whether a particular video image qualifies under the statutory definition of 'video programming.'" Pet. App. 84a.[14] "Thus, by any commonsense understanding of

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[13] *Video Dialtone Order*, 7 FCC Rcd at ¶¶ 76-77 & n.196 (noting that the "video programming" definition also allows telephone companies to provide video games, computer software, on-line airline guides, and one-way videotext such as news services and stock market information).

[14] The Court of Appeals nonetheless held that § 533(b) was not content-based on the ground that it was a restriction on the "mode of delivery of speech," Pet. App. 26a, akin to the regulations on the size and color of permissible copying of United States currency upheld in *Regan v. Time, Inc.*, 468 U.S. 641, 655-56 (1984). The Court of Appeals misunderstood the scope of § 533(b). It does not ban the delivery of information by wires, or even in video form. Rather, it bans only *certain* video images, depending on whether they are sufficiently "comparable" to broadcast television programming.

The Government conceded in the District Court below that a ban that enumerated 1984 television programming show-by-show — "the MacNeil/Lehrer Newshour," "news programs," "sitcoms," and so on — would be content-based and "would not be constitutional." Pet. App. 85a-86a n.22. The District Court asked, "If you got out the T.V. Guide for 1984 you could end up with a generic list of all the stuff that [was] on television [that year.] . . . What's the difference [between that and the statutory definition of video programming]?" *Id.* Neither petitioner had any response.

Thus, the relevant portion of *Regan v. Time* is not its discussion of the color and size rules but its analysis of the provision dealing with currency reproductions for "philatelic, numismatic, educational, historical, or newsworthy purposes," which this Court found to be impermissibly content-based. 468 U.S. at 648.

the term, the ban in this case is 'content-based.'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993) (ban on newsracks that distribute "commercial handbills," but not "newspapers," is content-based).[15] Indeed, the definition of "video programming" is so vague as to amount to a "know-it-when-we-see-it" standard which impermissibly vests the FCC with the power to "apprais[e] facts, ... exercise ... judgment, and ... form[] an opinion," creating an intolerable "danger of censorship and abridgement of our precious First Amendment freedoms." *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401-02 (1992) (citations omitted).

II. THIS COURT SHOULD NOT VACATE THE COURT OF APPEALS' JUDGMENT AND REMAND THE CASE FOR FURTHER PROCEEDINGS

Petitioners ask this Court to vacate the judgment below and remand the case to enable the Court of Appeals to consider the FCC's interpretation of the "good-cause" waiver provision, 47 U.S.C. § 533(b)(4), advanced in the *Third Report and Order*. But such a disposition would be unprecedented. Petitioners cite no case, and we have discovered none, in which this Court has ever vacated the judgment of a

[15] *See also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (law taxing general interest magazines, but exempting newspapers and religious, professional, trade, and sports journals, was content-based: "[i]n order to determine whether a magazine is subject to sales tax, Arkansas' enforcement authorities must necessarily examine the content of the message that is conveyed"); *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (invalidating ban on "editorials" — regardless of viewpoint or subject matter — by public broadcast stations receiving government funds and observing that, "in order to determine whether a particular statement by station management constitutes an 'editorial' proscribed by [the statute], enforcement authorities must necessarily examine the content of the message that is conveyed").

Court of Appeals holding a statute unconstitutional merely because an administrative agency has subsequently issued an order purporting to give a saving construction to the statute under review — particularly when the agency is a party to the case.[16] Similarly, petitioners cite no case in which this Court, in response to a proffered saving construction already urged upon but allegedly given inadequate attention by the lower courts, *see* pp. 16-20, *infra*, has vacated the judgment below and remanded the case for further consideration. NCTA observes that, in *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), the Government "urged [the] saving construction for the first time in [the] Supreme Court." NCTA Pet. 19. But *X-Citement Video* lends no support to petitioners' request because, even though the new interpretation in that case had not been presented below (unlike here), this Court proceeded to consider the new construction on the merits. This Court did not vacate the lower-court judgment in *X-Citement Video* and remand for further consideration in light of the Government's argument.[17]

The case at bar presents a particularly inappropriate occasion to depart from this Court's settled practice. Vacatur

[16] The only authority cited by either petitioner in support of their request, *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981) (cited at Govt. Pet. 16-17), involved the inapposite situation where an intervening Act of Congress changed the substantive law applied by the Court of Appeals. In fact, it was clear that "Congress was targeting" the particular case on review and sought to alter the outcome through new legislation. *Long v. Bureau of Economic Analysis*, 742 F.2d 1173, 1176 (9th Cir. 1984).

[17] Similarly, this Court did not vacate the lower court judgment and remand for further consideration when saving constructions were raised in this Court for the first time in the other cases cited by NCTA (NCTA Pet. 19 & n.17), such as *Jean v. Nelson*, 472 U.S. 846, 854-55 (1985), and *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961).

is an "extraordinary remedy" to which a party must demonstrate an "equitable entitlement." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392 (1994). Petitioners have not met their burden.

1. The FCC is a litigant in this case. The avowed purpose of its *Third Report and Order*, whose release was timed to coincide precisely with the due date for the Petitions for Certiorari, is to "make it unnecessary for [the Supreme Court] to decide whether a complete prohibition on video programming by telephone companies in their exchange areas is constitutional." Supp. Br. App. 7a. The *Order* itself is highly unusual, if not unprecedented, in FCC practice. The *Order* takes no concrete action on any application pending before the Commission and promulgates no specific terms and conditions governing the provision of video programming by telephone companies. The *Order* simply announces the FCC's agreement with the legal construction of the good-cause waiver provision (47 U.S.C. § 533(b)(4)) advanced by NCTA in its rehearing petition in the Court of Appeals in this case and the Commission's unilateral intention to abide by that construction for the time being.

In the past, this Court has had occasion to note descriptions of the Commission's procedural machinations as "'a sort of administrative shell game.'" *MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223, 2227 (1994) (citation omitted). Quite plainly, the *Third Report and Order* is another such maneuver.

2. This Court has held that the unilateral action of a losing party does not justify vacatur even if it renders the case moot. *U.S. Bancorp Mortgage Co.*, 115 S. Ct. at 393. The

Government conceded as much in that case.[18] Here, by contrast, neither petitioner contends that the FCC's unilateral action has the effect of rendering the controversy moot; instead, petitioners make the much more modest claim that the Commission's action alters "the legal landscape" of the question presented for review. Govt. Supp. Br. 6. Accordingly, the inappropriateness of vacatur in the instant case follows *a fortiori* from the decision in *U.S. Bancorp*. If petitioners' assessment of the effect of the *Third Report and Order* is correct (*but see* pp. 20-24, *infra*), this Court can consider the altered legal landscape when it reviews the case on the merits. There is no need for a remand to the Court of Appeals. There is no factual record to be built below, and no institutional reason that the Court of Appeals would be better able than this Court to evaluate the purely legal question of the implications of the *Third Report and Order* for the constitutionality of § 533(b).

3. The *Third Report and Order* is subject to change at the Commission's discretion. There is nothing to stop the FCC at any point in the future from reversing course, reinstating a narrow good-cause waiver policy, and resuming strict enforcement of what the FCC calls "the absolute ban [on video programming by telephone companies] contained in the statute." Supp. Br. App. 4a. The current rulemaking is in effect a statement of intent voluntarily to cease the challenged conduct, and it provides no reason for this Court to refrain

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[18] The Solicitor General conceded that, "[i]n our view, the losing party below should not be able to obtain vacatur of an unfavorable judgment through unilateral action, at least in the absence of unusual circumstances, such as when the losing party complies involuntarily with a preliminary injunction, or when a legislative enactment resolves the immediate controversy." Br. of U.S. as *Amicus Curiae* in No. 93-714, at 9 (citations omitted); *see also Karcher v. May*, 484 U.S. 72, 82-83 (1987) (denying vacatur where case became moot due to the actions of losing party).

from adjudicating the constitutionality of § 533(b). *See Northeastern Florida Contractors v. Jacksonville*, 113 S. Ct. 2297, 2301 (1993) (applying the "well-settled rule" that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice") (internal quotation omitted); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (municipality's repeal of ordinance does not prevent review because repeal "would not prevent [the city] from reenacting precisely the same provision if the District Court's judgment were vacated").[19]

4. The premise of petitioners' request is that, given "the newly developed argument about Section 533(b)(4)," NCTA Pet. 22, the lower courts have not yet "had an opportunity to consider the constitutionality of the statute's operation in combination with the FCC's construction of its waiver authority." Govt. Supp. Br. 6.

Even if that assertion were true, petitioners offer no excuse for their failure to present their supposed "saving construction" to the lower courts in timely fashion. Although the FCC's notice of proposed rulemaking did not issue until January 1995, and the *Third Report and Order* was not released until May 16, 1995, the statutory construction now urged by petitioners has always been available. Accordingly, even if petitioners' description of the proceedings in the lower courts were correct, petitioners offer no reason for this Court to depart from its usual prudential rule in federal cases of declining to decide issues not raised or resolved in the lower court. *E.g.*, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

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[19] *See also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.14 (1986); *United States v. Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

In fact, however, in the courts below petitioners repeatedly raised the good-cause waiver provision in their constitutional defense of § 533(b). Bell Atlantic's complaint introduced the issue from the very beginning, alleging that the good-cause waiver authority was unconstitutional.[20] The Government responded that the good-cause waiver provision could be given a saving construction that would "obviate the need" for the District Court to invalidate the statute.[21] The Government attempted to justify its construction, in the face of contrary judicial precedent, *see* pp. 21-22, *infra*, using the same arguments employed in the *Third Report and Order*.[22]

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[20] Paragraph 30 of the complaint alleged:

> Although section 533(b)(4) of the Cable Act provides that the FCC may in particular circumstances waive the video programming prohibition for "good cause," this waiver provision is inadequate to protect the plaintiffs' and consumers' right to free speech and is itself a violation of the First Amendment. Congress provided no standards or time limits by which the FCC must grant or deny a "good cause" waiver, but instead admonished the FCC that this "waiver authority should be narrowly construed." As a result, the FCC has unbridled discretion in determining whether and when, if ever, a "good cause" waiver may be granted.

[21] "[I]f this were (as plaintiffs' facial claim requires) a case where the statute's application serves no public interest under these circumstances, then the statute itself provides recourse by allowing application for a waiver. If granted, the waiver would obviate the need for this constitutional challenge." Govt. Reply Mem. at 33 (June 11, 1993).

[22] *Compare* Govt. Reply Mem. at 33 n.26 (June 11, 1993) ("Although the D.C. Circuit construed the FCC's waiver authority somewhat narrowly in *[NCTA v. FCC*, 914 F.2d 285 (D.C. Cir. 1990)], that case did not involve a constitutional challenge. Under settled rules of construction, statutes must be interpreted, where reasonably possible, in a manner that avoids possible constitutional infirmity. Thus, *[NCTA]* does not foreclose use of the waiver provision as a constitutional safety valve that precludes a facial challenge to the statute."), *with* Supp. Br. App. 20a-21a.

The Government also argued that § 533(b) is narrowly tailored under the *O'Brien* test because of its "statutory exceptions" including the good-cause waiver. Govt. Summary Judgment Br. 64 (May 22, 1993).[23] NCTA agreed.[24]

Respondents answered these arguments.[25] An *amicus* brief submitted by the United States Telephone Association devoted an entire section to the issue.[26] The district court

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[23] The Government noted that, in addition to a statutory exception for rural areas, § 533(b)(3), "the Commission may waive the rule with respect to any other community where the provision of broadband services might not take place except through the facilities of the local telephone company." Govt. Summary Judgment Br. 64. "Section 533(b)(4) also provides for a 'good cause' exception which permits waivers in particular cases based on specific showings of the benefits, e.g., exploitation of the technologies, that will flow therefrom." *Id.* at 64 n.56. "These exceptions to the rule, where its application might actually defeat its intended purpose, strongly buttress the conclusion that the statute is narrowly tailored to promoting the widest possible dissemination of information from the greatest diversity of sources." *Id.* (citing *News America Pub., Inc. v. FCC*, 844 F.2d 800, 803 (D.C. Cir. 1988) (discussing waiver provisions of newspaper/broadcast cross-ownership rules)).

[24] NCTA argued that the waiver opportunity "demonstrates that Congress has carefully balanced the competing policy considerations in adopting the measure and has provided mechanisms to avoid going farther than necessary." NCTA Summary Judgment Br. 57 & n.102 (May 21, 1993) (citing 47 U.S.C. § 533(b)(3) and (4)). NCTA claimed that the statute was "precisely tailored" because "Congress provided the FCC with the authority to grant waivers of the provision in circumstances where cable service could otherwise not exist 'or upon other showing of good cause.' 47 U.S.C. § 533(b)(4)." NCTA Supp. Mem. at 13 (July 9, 1993).

[25] *E.g.*, Plaintiffs' Reply Br. at 21 n.34 (June 5, 1993); Plaintiffs' Post-Argument Mem. at 23 (July 9, 1993).

[26] USTA Supp. Br. at 20-24 (July 9, 1993) ("The 'Good Cause' Waiver Cannot Insulate the Statute from Judicial Review").

was aware of the waiver opportunity and referred to it in its decision. *The Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 913 (E.D. Va. 1993) ("Congress also included, as had the Commission's regulations, a rural exemption and waiver authority for the Commission. *See* 47 U.S.C. § 533(b)(3) and (4).").

On appeal, NCTA continued to press the good-cause waiver argument.[27] The Court of Appeals expressly referred to the good-cause waiver authority in its decision, noting that it was "not implicated here," since Bell Atlantic was not attempting to speak via an exercise of the Commission's "discretionary authority to grant waivers of paragraphs (1) and (2)." Pet. App. 5a n.1.

In its petition for rehearing, NCTA raised at length the very "saving construction" that is adopted by the *Third Report and Order*. NCTA Pet. for Reh'g at 3-9. That petition urged the Court of Appeals not to invalidate § 533(b) on its face, offering what NCTA termed "the ready availability of a construction of the statute that avoids the serious constitutional questions recognized by the Court." *Id.* at 1-2. NCTA claimed that the "good-cause" waiver standard "allows just the sort of 'narrow tailoring' that would eliminate any constitutional issues." *Id.* at 6. In short, NCTA's petition for rehearing in the Court of Appeals included the same arguments as those in the *Third Report and Order* and in the

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[27] NCTA noted that § 533(b) included "waiver authority for the Commission," NCTA Appellant's Br. at 6 (Nov. 16, 1993), and contended that § 533(b) is "narrowly tailored" because the statute "narrows its application by providing for exceptions . . . ." *Id.* at 44 (citing 47 U.S.C. § 533(b)(3) and (4)). In a post-argument letter to the Court of Appeals, NCTA suggested again that § 533(b)(4) "might be invoked 'to obviate the constitutional question,' particularly in light of the Commission's receptivity on policy grounds to the telephone companies' interests in entering the cable business." Letter of Nov. 14, 1994, at 1 (citation omitted).

Petitions for Certiorari before this Court; indeed, in places the arguments are repeated essentially verbatim.

Thus, the "good-cause" waiver argument was amply aired in the courts below, and a remand for further consideration of the issue would not be appropriate.

5. Reinforcing this conclusion is the fact that the "saving construction" offered by petitioners is not a serious one. Although statutes are construed to avoid constitutional difficulties, that practice "is qualified by the proposition that 'avoidance of a difficulty will not be pressed to the point of disingenuous evasion.'" *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

Section 533(b) is structured as a general prohibition on video programming — what the FCC calls an "absolute ban," Supp. Br. App. 4a — followed by narrow exemptions. The statutory language of subsection (b)(4) contemplates that the Commission's waiver power would be restricted to relieving particular parties of the ban, in limited circumstances and upon a showing of exceptional circumstances,[28] as the FCC itself has recognized.[29] The very concept of a "waiver" is an

[28] A waiver can be granted only "upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection." 47 U.S.C. § 533(b)(4).

[29] The Commission has previously referred to its authority to grant temporary and "limited" waivers "in limited circumstances to acquire information on both technological and marketing innovations in the telecommunications marketplace." *General Telephone Co. of California*, 4 FCC Rcd 5693, 5698 (1989); *see also id.* (discussing limited duration of waiver and small number of subscribers affected and referring to "experimental authorizations to obtain information on technical and marketing data" and "initial experimental authorizations to develop a test bed of information about the provision of new video services").

exception to a general rule, not abolition of the rule itself. *Cf. Kleem v. INS*, 479 U.S. 1308 (1986) (Scalia, Circuit Justice) (construing "good cause" rule of 28 U.S.C. § 2101(c)). Yet the *Third Report and Order* would have the exception swallow the rule, by allowing the FCC to waive the ban of § 533(b) at its option — even to the point of substantially eliminating it for the entire local telephone industry on a 'routine[]" basis. *Id.* at 19a. Accordingly, the Commission's proposal is no less dubious than its prior attempt to rewrite a different section of the Communications Act that this Court condemned in *MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223 (1994).[30]

Not surprisingly, the *Third Report and Order* flies in the face of the only authoritative judicial interpretation of § 533(b)(4). In *NCTA v. FCC*, 914 F.2d 285 (D.C. Cir. 1990), the Court of Appeals, on petition for review filed by the NCTA, reversed a good-cause waiver granted by the Commission to a telephone company affiliate to play a partial role in the operation of an experimental fiber-optic system in a single California community — a much more limited request than the sea change proposed by the *Third Report and Order*. Even so, the Court of Appeals did not find persuasive the Commission's claim that it had "considered the potential for technological and marketing innovation to be a basis for a good cause waiver and that it enjoyed considerable latitude in

[30] In *MCI*, this Court held that the Commission did not have the authority to implement a detariffing policy because it had the power only to "modify" requirements, not to alter the statute in significant fashion. The same is true in this case. Just as one would not refer to the 1972 mining of Haiphong and bombing of North Vietnam as simply "modifying [the Administration's] position with regard to prosecution of the war in Vietnam," 114 S. Ct. at 2230, so one would not refer to the American withdrawal from Vietnam as a "good-cause waiver" of U.S. policy.

permitting experiments promoting technological innovation." *Id.* at 288. The court explained that "[t]he policy of the subsection, which the Commission must take into consideration, is to prohibit a telephone company's cross ownership of a cable facility absent a finding that a community would not otherwise be served by cable or because a waiver is justified by good cause." *Id.* at 289. The court held that a waiver was unavailable absent a showing that telephone company participation was "necessary" to the construction or operation of a cable system. *Id.*[31]

The *Third Report and Order* also contradicts the Commission's previous construction of its waiver authority. Until now, the Commission has maintained that, at most, current law allows a 5% ownership stake by telephone companies in an entity that provides video programming.[32] The FCC previously has rejected any interpretation of § 533(b)(4) that would make good-cause waivers widely available, observing that legislative history accompanying the 1984 Cable Act explains that "it 'is the policy of this subsection [§ 533(b)] that telephone companies should be prohibited from providing video programming directly to subscribers in their telephone service areas. The waiver authority should be narrowly construed and exercised in a manner that does not undermine the basic policy of this

[31] The *Third Report and Order* (at ¶ 16) also claims support in *GTE California, Inc. v. FCC*, 39 F.3d 940 (9th Cir. 1994). But the Ninth Circuit quite plainly did not envision anything like what the Commission advocates before this Court. The Ninth Circuit stated: "Because the Commission has no power to declare Section 533(b) unconstitutional, we can assume it will continue to require telephone companies to comply with it." *Id.* at 946.

[32] *Video Dialtone Order*, 7 FCC Rcd at ¶¶ 15, 35-36.

subsection.'"[33] The *Third Report and Order* barely acknowledges this radical shift in the Commission's interpretation, let alone attempts to explain it, as the FCC was required to do. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).[34] For its part, the NCTA previously has also strenuously argued for a limited view of § 533(b)(4).[35]

6. Finally, if the *Third Report and Order* would "alter[] the legal landscape," Govt. Supp. Br. 6, it would only reinforce the correctness of the Court of Appeals' judgment, for the supposed "saving construction" announced by the Commission would compound rather than cure the constitutional defect in § 533(b). The Commission unilaterally promises that it will "routinely" grant waivers so long as "the telephone company agrees to abide by the regulations we will establish governing its provision of video programming." Supp. Br. App. 19a. But the fact remains that, under the *Third Report and Order*, telephone company video speech will

[33] *Telephone Company-Cable Television Cross Ownership Rules*, 3 FCC Rcd 5849, 5850 (1988) (quoting 130 Cong. Rec. H 10,444 (daily ed. Oct. 1, 1984)); *see also* Br. of Government in *Ameritech Corp. v. United States*, No. 95-1223, at 43 (7th Cir.) (filed Mar. 13, 1995) (admitting that the possible re-interpretation of § 533(b)(4) "would constitute a significant change in the agency's prior understanding of the statutory requirements").

[34] In the *Third Report and Order*, the Commission notes simply that "[w]e have waived the cable-telco cross-ownership rules on a number of occasions. Typically, these waivers have been sought on a temporary basis for experimental purposes, or to allow telephone companies to come into compliance with our cross-ownership rules by, for example, divesting cable holdings acquired after mergers." Supp. Br. App. 5a n.6.

[35] *See, e.g.*, Br. of Petitioner in *NCTA v. FCC*, No. 89-1517, at 37 (filed Apr. 6, 1990) ("Congress has instructed that [the FCC's] waiver authority must be narrowly construed").

be illegal until the Commission decides whether, when, and how to allow it, and the Commission will be in sole control of the waiver procedure. The Commission has the power to create, and to change, the still-to-be-developed terms and conditions on which telephone companies will be able to seek waivers to enable them to exercise their First Amendment freedoms. There is no statutory definition of "good cause." There is no specified time within which the Commission is required to act on waiver applications,[36] and in fact it was stipulated in this case that waiver applications have languished for years before the Commission.[37] Indeed, by illustrating how the FCC can expand and contract its waiver authority so dramatically, and completely at will, the *Third Report and Order* underscores just how vast the Commission's discretion is.

Thus, the good-cause waiver authority is itself an open-ended grant of standardless licensing power, in violation of the fundamental principle that the government "cannot vest restraining control over the right to speak [in] an administrative official where there no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951).[38] Even under the *Third Report and Order*, § 533(b) remains an unconstitutional restraint on speech.

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[36] "[T]he failure to confine a time within which the licensor must make a decision contains the same vice as a statute delegating excessive administrative discretion." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226-27 (1990); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 771 (1988); *Riley v. National Federation for the Blind*, 487 U.S. at 802.

[37] Stipulated Facts 58-60 [JA 8725-26].

[38] *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. at 1513 n.19; *Forsyth County*, 112 S. Ct. at 2402-03; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 225-26; *City of Lakewood*, 486 U.S. at 755-59, 769-72; *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 964 n.12, 968 (1984).

CONCLUSION

This Court should grant the petitions for certiorari and set the case for plenary briefing and argument in the usual course. In the alternative, this Court should deny certiorari altogether. In no event should this Court vacate the decision of the Court of Appeals and remand the case for further consideration.

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